

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

CARMEN H. LOPEZ,
Petitioner/Appellant,

v.

TONY ALAN BATCHELDER,
Respondent/Appellee.

No. 2 CA-CV 2016-0097
Filed December 27, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Graham County
No. DO201600027
The Honorable D. Corey Sanders, Judge

REVERSED AND REMANDED

COUNSEL

J. Grant Walker, Safford
Counsel for Petitioner/Appellant

Channen Day, P.C., Safford
By Channen Day
Counsel for Respondent/Appellee

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MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Judge Espinosa and Judge Staring concurred.

H O W A R D, Presiding Judge:

¶1 Carmen Lopez appeals from the trial court's order granting Tony Batchelder's motion to dismiss, for lack of standing, her petition to establish legal decision making, parenting time, and child support of a minor child, Z.B. Lopez argues the trial court erred by finding that she lacked standing to petition for third-party decision-making on the ground she was not a legal parent and was never married to Batchelder, who had adopted Z.B. in a single-parent adoption. Because we conclude the trial court erred, we reverse.

Factual and Procedural Background

¶2 In reviewing a motion to dismiss, we view the facts in the light most favorable to the non-moving party. *McMurray v. Dream Catcher USA, Inc.*, 220 Ariz. 71, ¶ 2, 202 P.3d 536, 538 (App. 2009). But the facts here are essentially undisputed. Z.B. was born in 2004 to Batchelder's sister, E.B. When Z.B. was approximately one-year old, her father murdered E.B. In 2006, Z.B. began to live with Batchelder and Lopez, an unmarried couple. By 2012, Lopez and Batchelder had separated but continued to share parenting time between Z.B. and their other child.

¶3 In 2015, Batchelder adopted Z.B., in a single-parent adoption. In 2016, Lopez filed a petition to establish legal decision making and parenting time pursuant to A.R.S. §§ 25-402 and 25-409. Batchelder moved to dismiss the petition, arguing that Lopez lacked standing because she could not establish any of the requirements of A.R.S. § 25-409(A)(4). The trial court granted the motion to dismiss and, relying on *Sheets v. Mead*, 238 Ariz. 55, 356 P.3d 341 (App. 2015), explained that "it is clear from the plain statutory requirements that

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a third-party does not have standing to bring a petition in the case of a single-parent adoption.” Lopez timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1).

Discussion

¶4 Lopez contends the trial court erred by applying our reasoning in *Sheets*, instead of our reasoning in *Thomas v. Thomas*, 203 Ariz. 34, 49 P.3d 306 (App. 2002), and consequently erred in determining that she lacked standing to seek legal decision making and visitation under § 25-409. “The question of whether a party has standing . . . is a question of law . . . we review . . . de novo.” *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 16, 81 P.3d 1016, 1021 (App. 2003). We also review de novo the “interpretation and application of statutes.” *Thomas*, 203 Ariz. 34, ¶ 7, 49 P.3d at 308.

¶5 Section 25-409 allows “a person other than a legal parent” to petition for legal decision-making authority or visitation with a child. Section 25-409(A) allows a petition for legal decision-making authority but requires that the trial court summarily deny the petition unless the third-party petitioner can show, among other requirements not at issue here, that “[i]t would be significantly detrimental to the child to remain . . . in the care of [the] legal parent who wishes to keep . . . legal decision-making.” § 25-409(A)(2). It also requires that one of the following applies:

- (a) One of the legal parents is deceased.
- (b) The child’s legal parents are not married to each other at the time the petition is filed.
- (c) A proceeding for dissolution of marriage or for legal separation of the legal parents is pending at the time the petition is filed.

§ 25-409(A)(4).

¶6 Section 25-409(C), in contrast, governs petitions for third-party visitation. This subsection allows the trial court to grant

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visitation rights if the “visitation is in the child’s best interest” and if it finds, as relevant here, that

1. One of the legal parents is deceased or has been missing at least three months. . . .

2. The child was born out of wedlock and the child’s legal parents are not married to each other at the time the petition is filed.

. . . .

4. For in loco parentis visitation, a proceeding for dissolution of marriage or for legal separation of the legal parents is pending at the time the petition is filed.

§ 25-409(C). Thus, § 25-409 distinguishes between third-party legal decision-making and third-party visitation rights, and lays out different standards to establish each.

¶7 In *Thomas*, this court considered whether a single-parent adoption precluded a petition for legal decision-making under § 25-409(A)¹ by a non-legal parent.² 203 Ariz. 34, ¶ 13, 49 P.3d at 309. We concluded the phrase “[t]he child’s legal parents are not married to each other at the time the petition is filed” in § 25-409(A)(4)(b) applied in single-parent adoption cases because we found nothing to suggest the legislature intended that statute to “arbitrarily remove adopted children” from the protection of the statute. *Id.* ¶ 13. Because there was only one unmarried legal parent in *Thomas*, this

¹The *Thomas* court construed former A.R.S. § 25-415(A), which governed in loco parentis custody. 203 Ariz. 34, ¶ 11, 49 P.3d at 308; 1997 Ariz. Sess. Laws, ch. 295, § 1. That statute was renumbered in 2012 as § 25-409(A)(4)(B). 2012 Ariz. Sess. Laws, ch. 309, §§ 20, 24. We refer solely to § 25-409 throughout this decision.

²*Thomas* concerned a petition for “child custody.” 203 Ariz. 34, ¶ 4, 49 P.3d at 307. Child custody is now referred to as legal decision-making. *Christopher K. v. Markaa S.*, 233 Ariz. 297, n.2, 311 P.3d 1110, 1111 n.2 (App. 2013).

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court reasoned “[t]hat the child has always had only one legal parent obviously means that she did not have two legal parents who were married to each other when the petition was filed,” thereby meeting the § 25-409(A)(4)(b) requirement. *Id.*

¶8 In *Sheets*, 238 Ariz. 55, ¶¶ 1-2, 356 P.3d at 342, this court considered whether a third-party could seek visitation in a single-parent adoption under § 25-409(C). The third-party petitioner was in a same-sex relationship with the respondent, and they began to foster a child under an adoption case plan. *Id.* ¶ 2. Both parties agreed that Sheets would be the adoptive parent, but that both parties would act as parents. *Id.* At the time, same-sex couples were prohibited from adopting children together. *Id.* The trial court granted substantial visitation rights to the third-party petitioner. *Id.* ¶ 4. The court found “that ‘the Child was born or adopted out of wedlock; the Child’s legal parents are not married to each other; and [the third-party petitioner] has a long term *in loco parentis* relationship with the Child.’” *Id.*

¶9 This court noted, however, that an adoption, even if by a single parent, was considered as having occurred “within ‘lawful wedlock.’” *Id.* ¶ 13, quoting *In re Maricopa Cty. Juv. Action No. JA-502394*, 186 Ariz. 597, 599 & n.3, 925 P.2d 738, 740 & n.3; see also A.R.S. § 8-117(A) (“[A]ll the legal rights, privileges, duties, obligations and other legal consequences of the natural relationship of child and parent . . . exist between the adopted child and the adoptive parent as though the child were born to the adoptive parent in lawful wedlock.”). Thus, we held “that a child who is adopted before a visitation petition is filed is not eligible for nonparent visitation under § 25-409(C)(2).” *Sheets*, 238 Ariz. 55, ¶ 16, 356 P.3d at 344.

¶10 *Sheets* and *Thomas* reflect that § 25-409 contemplates different standards for different classes of third parties and different kinds of petitions. The court in *Sheets* confronted a question regarding standing to petition for third-party visitation rights in a single-parent adoption under § 25-409(C). 238 Ariz. 55, ¶ 16, 356 P.3d at 344. The court determined that the non-legal parent did not have standing, because such a parent would fail, as a matter of law, to meet the “born out of wedlock” requirement in § 25-

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409(C)(2). *Id.* *Thomas*, by contrast, considered whether a non-legal parent in a single-parent adoption case had standing to petition for sole legal decision-making. 203 Ariz. 34, ¶ 13, 49 P.3d at 309. These two cases construe distinct legal standards, and *Thomas* construed the exact requirement at issue here and thus controls. *Id.* Although Lopez cannot show standing under § 25-409(C)(2), she can satisfy the § 25-409(A)(4)(b) standing requirements in light of *Thomas*. Thus, the trial court erred by dismissing her petition.

¶11 Batchelder, however, argues in his answering brief that this case is distinguishable from *Thomas* in a number of ways. First, he contends that *Thomas* is distinguishable because the parties there had stipulated to custody fourteen years before the decision. 203 Ariz. 34, ¶ 3, 49 P.3d at 307. But, in its analysis, the *Thomas* court stated the parties cannot confer jurisdiction on the court by stipulation and noted that the appellee was a “non-legal parent” for the purposes of a third-party petition for legal decision making. *Id.* ¶¶ 9, 11-14.

¶12 Batchelder also argues that *Thomas* and *Sheets* are “in direct conflict . . . insofar as it logically follows that a child that is not eligible for non-parent visitation would not be eligible for non-parent legal decision-making authority or placement of a child.” But in order to sustain a petition for third-party legal decision-making, the petitioner must establish that “[i]t would be significantly detrimental to the child to remain . . . in the care” of the legal parent. § 25-409(A)(2). Third-party visitation under § 25-409(C), on the other hand, does not contain this heightened requirement. *Thomas* and *Sheets* are therefore consistent in their interpretation of § 25-409, which disallows petitions for visitation while allowing a petition for sole legal decision-making in a single-parent adoption case.

¶13 Finally, Batchelder contends that the *Sheets* court clearly disagreed with *Thomas* and that *Thomas’s* interpretation of the precursor to § 25-409 is nonetheless dicta. But as we noted above, *Sheets* and *Thomas* construe different subsections of the third-party rights statute and the court in *Sheets* does not mention *Thomas*. *Sheets*, 238 Ariz. 55, 356 P.3d 341. Additionally, Batchelder has not cited to any authority nor explained in any detail his contention that a portion of *Thomas* is dicta. That argument is therefore waived.

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Ariz. R. Civ. App. P. 13(a)(7) (“An ‘argument’ . . . must contain . . . contentions . . . with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies.”); *Polanco v. Indus. Comm’n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007).³

Disposition

¶14 Based on the foregoing, the judgment of the trial court is reversed, and this case is remanded for proceedings consistent with this decision.

³Lopez also contends she could satisfy the requirements of A.R.S. § 25-409(A)(4)(a), which states that a third party can satisfy the standing requirement when “[o]ne of the legal parents is deceased.” Because we remand on the basis of § 25-409(A)(4)(b), we do not reach this issue.